

NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CELERA CORP. SEC. LITIG.,

Case No. 5:10-cv-02604 EJD (HRL)

This Document Relates To:

**ORDER RE DISCOVERY DISPUTE  
JOINT REPORT NO. 1**

ALL ACTIONS.

[Re: Dkt. No. 130]

In this action for alleged securities fraud, plaintiff Washtenaw County Employees' Retirement System sues on behalf of a putative class who reportedly suffered damages in connection with the acquisition of Celera Corporation (Celera) common stock. In September 2012, Judge Davila denied Celera's<sup>1</sup> motion to dismiss the Second Amended Complaint. Plaintiff and Celera then began discovery and subsequently agreed, in September 2013, to a May 2, 2014 fact discovery cutoff.

Meanwhile, in August 2013, plaintiff moved for leave to file a Third Amended Complaint (TAC) adding PricewaterhouseCoopers (PwC) as a defendant. That motion was granted on October 3, 2013, and plaintiff filed the TAC the next day. PwC has filed a motion to dismiss, which the parties say currently is set for a March 28, 2014 hearing before Judge Davila.

<sup>1</sup> This court uses the term "Celera" to refer collectively to Celera and individual defendants Kathy Ordonez, Ugo DeBlasi, Joel Jung, and Christopher Hall.

At issue in Discovery Dispute Joint Report (DDJR) No. 1 is the scope of discovery, if any, that plaintiff may pursue while PwC's motion to dismiss is pending. Plaintiff argues that the discovery stay, codified in § 78u-4(b)(3)(B) of the Private Securities Litigation Reform Act (PSLRA), does not apply to discovery propounded on Celera, notwithstanding that PwC's motion to dismiss remains pending. Specifically, plaintiff seeks an order compelling Celera to produce its former Vice President of Finance, Heather Abbis, for deposition. Additionally, plaintiff argues that, as Celera's auditor during the relevant period, PwC is obliged to respond to a third-party document subpoena that plaintiff served in October 2012, i.e., before PwC was named as a defendant and at a time when there were no pending motions to dismiss. It claims that PwC has not produced all responsive documents.

Celera and PwC contend that the PSLRA stays all discovery until PwC's motion is resolved. After PwC advised of its intent to move to dismiss the claims against it, Celera says that it told plaintiff that it would not produce any witness (including Abbis) for deposition more than once and that all depositions were subject to PwC's right to a stay under the PSLRA. As a compromise, however, Celera is willing to agree that (1) plaintiff may propound non-party discovery that does not require PwC's participation; and (2) Celera will continue to provide documentary discovery as long as that discovery (i) does not require PwC's active participation and (ii) would not subject Celera to duplicate its discovery efforts (e.g, requiring a witness to appear more than once) if PwC's motion to dismiss is denied. (See Dkt. 130, DDJR No. 1 at 10).

The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of the parties' respective arguments, the court finds that the PSLRA stay applies to all discovery, but will nevertheless adopt Celera's proposed compromise.

The PSLRA provides, in relevant part:

In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

1 15 U.S.C. § 78u-4(b)(3)(B). “This section was ‘intended to prevent unnecessary imposition of  
2 discovery costs on defendants.’” SG Cowen Securities Corp. v. U.S. Dist. Ct., 189 F.3d 909, 911  
3 (9th Cir. 1999) (quoting H.R. Conf. Rep. No. 104–369, 104th Cong. 1st Sess. at 32 (1995),  
4 reprinted in 1995 U.S.C.C.A.N. Sess. 731). Another purpose of the stay is to prevent a plaintiff  
5 from using discovery to uncover facts to formulate a claim. Id. at 912 (“[T]he district court  
6 granted plaintiffs leave to conduct discovery so that they might uncover facts sufficient to satisfy  
7 the [PSLRA]’s pleading requirements. This is not a permissible reason for lifting the discovery  
8 stay under the [PSLRA].”).

9 Plaintiff argues that where (as here) multiple defendants have brought multiple motions to  
10 dismiss, the PSLRA does not require staying discovery against defendants whose motions to  
11 dismiss were denied, even though other defendants’ motions remain pending. Courts that have so  
12 held have found § 78u-4(b)(3)(B) to be ambiguous. See, e.g., In re Global Crossing, Ltd. Sec.  
13 Litig., 322 F. Supp.2d 319, 353 (S.D.N.Y. 2004); In re Lernhout & Hauspie Sec. Litig., 214 F.  
14 Supp.2d 100 (D. Mass., 2002); Latham v. Stein, No. 6:08-2995-RBH, 6:08-3183-RBH, 2010 WL  
15 3294722 (D. S.C., Aug. 20, 2010).

16 Defendants point out that other courts conclude that the plain language of the PSLRA is  
17 unambiguous and requires a stay of all discovery while any defendant’s motion to dismiss is  
18 pending, even if some claims are sufficiently pled as to other defendants. See, e.g., In re Finisar  
19 Crop. Derivative Litig., No. C06-07660 RMW, 2012 WL 609835 (N.D. Cal., Feb. 24, 2012);  
20 Fosbre v. Las Vegas Sands Corp., Nos. 2:10-cv-0210-KJD-GWF, 2:10-01210-KJD-GWF, 2012  
21 WL 5879783 (D. Nev., Nov. 20, 2012); Sedona Corp. v. Ladenburg Thalmann, No. 03 Civ. 3120  
22 LTSTHK, 2005 WL 2647945 (S.D.N.Y., Oct. 14, 2005).

23 On the whole this court agrees with those who find that the plain language of the PSLRA  
24 stays all discovery while any motion to dismiss is pending. Plaintiff has not convincingly  
25 demonstrated that particularized discovery is necessary to preserve evidence or to prevent undue  
26 prejudice. “Prejudice caused by the delay inherent in the PSLRA’s discovery stay cannot be  
27 ‘undue’ prejudice because it is prejudice which is neither improper nor unfair.” In re CFS-Related

1 Securities Fraud Litig., 179 F. Supp.2d 1260, 1265 (N.D. Okla. 2001). “Rather, it is prejudice  
2 which has been mandated by Congress after a balancing of the various policy interests at stake in  
3 securities litigation, including a plaintiff’s need to collect and preserve evidence.” Id. Nor have  
4 plaintiffs “demonstrated a specific instance in which the loss of evidence is imminent as opposed  
5 to merely speculative.” Id.; see also SG Cowen Securities Corp., 189 F.3d at 911-12. There  
6 seems to be no serious dispute that allowing plaintiff to proceed with Abbis’ deposition now will  
7 require PwC to monitor or attend the examination while its motion to dismiss is pending, or may  
8 require Celera to produce her again later if PwC’s motion to dismiss is denied. PwC also points  
9 out that plaintiff’s cited decisions do not stand for the proposition that discovery may proceed as  
10 to newly added defendants, such as PwC, who have not yet tested the adequacy of the allegations  
11 against it. Indeed, “a construction of the statute that would allow discovery to proceed as to non-  
12 moving defendants would be unfair to the defendants who have filed motions to dismiss because  
13 they may, as a practical matter, be required to monitor or participate in the discovery regarding the  
14 non-moving defendants before the sufficiency of the complaint against them has been  
15 determined.” Fosbre, 2012 WL 5879783 at \*3 (citing CFS-Related Sec. Fraud Litig., 179 F.  
16 Supp.2d 1260, 1263-64 (N.D. Okla. 2001)).

17 Even so, plaintiff and Celera engaged in discovery between themselves for over a year.  
18 And, even Celera agrees that there are categories of discovery plaintiff may conduct now without  
19 violating the PSLRA stay. Accordingly, this court concludes that the best balance will be struck  
20 by adopting Celera’s proposed compromise, namely: (1) plaintiff may propound non-party  
21 discovery that does not require PwC’s participation; and (2) Celera will continue to provide  
22 documentary discovery as long as that discovery (i) does not require PwC’s active participation  
23 and (ii) would not subject Celera to duplicate its discovery efforts if PwC’s motion to dismiss is  
24 denied.

25 SO ORDERED.

26 Dated: February 25, 2014

27   
28 HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

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